No. 20671

In the

United States Court of Appeals

for the Ninth Circuit

ROBERT E. MCCARTHY, Successor to WALTER E. BECK, as Manager of the United States Land Office at Sacramento, California,
Appellant,

vs.

LEONARD E. NOREN and HARRY C. PERRY,
Appellees.

Appeal from the United States District Court for the Southern District of California Northern Division

Brief for Appellees

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

STATUTES

MISCELLANEOUS

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STATEMENT OF THE CASE

This statement is included in the interests of clarity for the reason that the statement of appellant does not present the complete picture.

Appellees, citizen residents of Ventura County, State of California, filed separate Desert Land applications in 1951 and 1952 with the United States Land Office at Sacramento, California, the Noren application covering the S½ of Section 22 and the Perry application the SE¼ of Section 20, both in Township 32 South, Range 26 East, M.D.B.&M., in

Kern County, California. The applications were made out on forms supplied by the Land Office and in accordance with its requirements and were accepted and filed by the Land Office upon the payment by appellees of the 25¢ per acre prescribed by the statute. (Complaint, R-3-4; Answer, R-99)

Thereafter, on January 9, 1953, and without any prior notice to appellees, both applications were rejected by the appellant on the alleged ground that the lands applied for were unsuited for agricultural development. (R-4) Appellant admits the filing of the applications and their rejections but denies approval of their form or their content. (R-100) No hearings of any kind were ever accorded either of the appellees prior to rejection of their applications.

Appellees appealed these rejections and pursued their administrative remedies without success until those remedies were exhausted in 1960. Appellees filed the present action alleging that the lands applied for were in truth and in fact suitable for agricultural purposes and that they had been deprived of their property rights in the lands applied for without a hearing in violation of the due process provisions of the United States Constitution. The complaint also alleges (R-5) discrimination in that similar Desert Land applications on nearby lands by other applicants were allowed by the same manager of the Sacramento Land Office in the same soil belt area covering lands with virtually identical soil constituency as those applied for by appellees and alleges that this discriminatory action was arbitrary and capricious. The complaint (R-6, 7) seeks judgment enjoining any further action adverse to appellees and requiring the setting aside of the rejections of their applications, the reinstatement of the same and their allowance.

The appellant is the present manager of the United States Land Office at Sacramento, California. It is alleged in the complaint (R-5) and admitted in the answer that the appellant is empowered under the law and the regulations to allow Desert Land applications. (R-4; R-100)

At the trial in the District Court, the Court received evidence on the questions of jurisdiction and any hearings accorded appellees before the rejection of their applications by appellant. The appellant introduced only the Administrative Record.

The necessary jurisdictional values were proved by appellees by photographic evidence of the excellent agricultural crops actually growing on acreages adjoining the lands in their applications and expert testimony as to the similar possibilities of the lands in question.

The District Court found that appellees by their applications as accepted by the Land Office at Sacramento had acquired property rights of which they had been deprived without due process and that they were entitled to a constitutional hearing on this question. With this finding, the Court discontinued the trial without touching the second cause of action in the complaint and remanded "the cause to the defendant (appellant) Robert E. McCarthy, as manager of the United States Land Office at Sacramento, California, and to the Bureau of Land Management of the United States Department of the Interior for the purpose of setting aside said rejections, and each of them, and conducting further hearings consistent with the findings of this Court." (R-155-6) These findings prescribed hearings at which appellees would have the right to present evidence, to be confronted with opposing evidence and to cross-examine opposing witnesses. (R-152-154)

Motion of the appellees to dismiss the appeal on the ground that the Order of Remand was not a final disposition of the issues was denied without comment by this Court on February 9, 1966.

QUESTIONS PRESENTED

1. Whether the Order of Remand from which this appeal was taken represented a final disposition of the issues in the case on their merits and is appealable.

2. Whether the statutory discretion given the Secretary of the Interior to classify lands is absolute and unreviewable.

3. Whether the appellees acquired property rights by the filing of their Desert Land applications of which they could not be deprived without a constitutional hearing.

4. Whether the appellant was guilty of abuse of discretion and violation of the constitutional rights of appellees in rejecting appellees' applications without affording them a constitutional hearing.

5. Whether the present action is subject to the plea of res judicata.

SUMMARY OF ARGUMENT

A. The authorities are virtually unanimous to the effect that an Order of Remand such as that from which this appeal was taken is not a final disposition of the issues of this matter on the merits. For this reason, there is lacking that finality required to make the Order appealable to this Court under 28 U.S.C.A. 1291. Obviously, the Order is not appealable under 28 U.S.C.A. 1292. The District Court, after proof of jurisdiction and lack of due process, discontinued the trial without touching the second cause of action and ordered the matter remanded to the appellant and the Bureau of Land Management, Department of the Interior,

for correction of the procedural errors. Under such circumstances, the Order of Remand is not a final disposition of the issues and therefore is not appealable.

B. This is an action against the manager of the United States Land Office at Sacramento, California, the appellant here and no one else. The complaint alleges (R-4) and the answer admits (R-99) that appellant in his capacity as manager of the United States Land Office at Sacramento, California, has the power to allow or reject Desert Land applications and thus is empowered to take corrective measures in this action. The Secretary of the Interior is not a party and his discretionary powers dwelt on at length in generalities by appellant are irrelevant except to the extent that such discretionary powers are also shared by appellant. The only questions here are whether appellees acquired property rights in filing their Desert Land applications, whether appellant failed in the necessary constitutional respect for any such property rights and whether appellant was guilty of abuse of discretion in disposing of their applications.

C. It is alleged in the complaint (R-5) that appellant allowed Desert Land entries on adjacent lands in the same identical soil belt which included the lands of appellees' rejected applications as determined by soil experts of the United States Department of Agriculture and the Experiment Station of the University of California. The statute makes classification mandatory on lands applied for under public land statutes and such classifications must be in accord with the facts without discretionary modification. The complaint alleges (R-5) that the classification by appellant of the lands sought by appellees was not only erroneous but also discriminatory, arbitrary and capricious. Where an Administrative agency acts arbitrarily, capriciously or

fraudulently, such action constitutes an abuse of discretion, and since it is unauthorized, it also is an excess of jurisdiction subject to correction by the Courts.

D. Under Sections 1 and 7 of the Taylor Grazing Act, as amended (43 U.S.C.A. 315, 315f) an applicant for Desert Land entry acquires an inchoate property right and the rules and regulations of the Department of the Interior formerly recognized the acquisition of such a right. The possessor of such a right is entitled to a full constitutional hearing before he can lawfully be deprived of that right. This sort of a hearing appellees did not have. The Department of the Interior is not the only Federal Administrative Agency which has had to abandon a traditional procedure of decisions emanating from a much censured prosecutor-judge arrangement in favor of a course of action affording an aggrieved party a real opportunity to be heard.

E. This action is not subject to the plea of res judicata for the simple reason that in case No. 2139 in the District Court the issues were confined to the Administrative Record at the instance of the appellant and the ruling of the Court. The constitutional and abuse of discretion issues in the second cause of action in the complaint were excluded from consideration by the successful motion of appellant and were not before the Court in No. 2139 as is clearly shown by the decision of the District Court as reported in *Noren v. Beck,* 199 F.S. 708, 709. The causes of action pleaded in this case (R-1-8) are entirely different from those cognizable within the confines of the Administrative Record and under the authorities are available in this present action.

F. Appellees sustained a substantial loss from the arbitrary and capricious rejections of their applications by appellant as the lands covered by their applications had genuine agricultural possibilities of real merit as has been

shown by subsequent developments in the area, developments photographically in evidence as Exhibits 5 and 6 before the District Court and on file in this Court. Furthermore, they were denied the valuable right of an opportunity to test the evidence against them by cross-examination and refutation prior to the decision.

ARGUMENT

Introduction

Appellant argues that administrative statutory construction of 29 years standing is in the balance in this appeal and that the decision of the District Court from which this appeal is taken would require a major change in procedure followed by the Department of the Interior. This is an exaggeration and somewhat inaccurate as will appear later. Apparently, the argument is that even the sidetracking of constitutional rights can improve with age. But the procedure attempted to be justified by appellant is a part of that administrative method widely condemned as combining in a single body the functions of prosecutor and judge. Congress was particularly critical of this arrangement where constitutional rights were involved.

The Department of the Interior has recognized for some time that on issues of property rights a hearing of some sort was mandatory as will be shown later. For many years it has conducted numerous hearings of this type, all within the family. Such hearings will be continued, it is to be presumed, under Administrative Procedure Act rules. How many more "adversary type" (a more descriptive word is "constitutional") hearings would result from requiring them in cases like the present is problematical. Appellant paints a gloomy picture on page 15 of his brief with a figure of 21,403 classifications pending in 1958. How-

ever, for purposes of this case, this total is to be discounted severely. There are a multitude of such classifications taking place continually where no contests occur. The significant figure would be the number of rejections of public land applications recorded during the year. Failure to produce this total suggests that it would not be too impressive. However, the question is of doubtful relevancy in cases in which constitutional rights are at stake.

A. The Order of Remand is not appealable as it lacks the necessary finality.

Appellees presented this contention to this Court by motion made on February 7, 1966, which was denied without comment. Appellees request the indulgence of the Court in the following more extensive review of the authorities on this point.

The Order of Remand here under appeal was made by the District Court without receiving any evidence on the second cause of action of the complaint. The Court gave advance notice to both parties on November 10, 1964, that in the event it was found that appellees had not been afforded due process, the Court intended "to return the case to the administrative agency for hearings." The Order of Remand rather obviously could not and did not attempt to make any disposition on the merits of the other issues in the case or reach any conclusions thereon. It is clear therefore, that there has been no final disposition of the issues at this time.

It will be noted that the Order of Remand required the appellant to set aside the rejections previously made by his predecessor and to hold further hearings consistent with the findings of the District Court which prescribed opportunity for appellees to know the evidence of the opposition,

to meet it and to cross-examine its witnesses and present evidence of their own. In other words, a new record would have to be made.

This required procedure is virtually identical with that before the United States Supreme Court in *Ford Motor Co. v. NLRB.*, 305 U.S. 364, a leading case, which was an appeal from an order of an Appeals Court remanding a cause to the National Labor Relations Board for the purpose of setting aside the findings of the Board assailed in the Court below and making a new record. The appellant in that case objected that the lower Court had not considered the merits of all of its criticisms of the original findings of the Board upon which it had based its petition for review. However, the Supreme Court said that these criticisms might be obviated in the new proceedings and ruled at p. 372:

> "Second. The cause was remanded to the Board for the purpose 'of setting aside its findings and order of December 22, 1937, and issuing proposed findings, and making its decision and order upon a reconsideration of the entire case.' The Board in its application for the remand stated that it would take that course. The specified purpose qualified the court's order. It created a condition which the Board was bound to observe. If the Board within a reasonable time failed to set aside its findings and order, we have no doubt that the court could vacate its order of remand and proceed with its consideration of the petition to review. The propriety of the order of remand must be considered in that aspect."

What happened in that case corresponds rather exactly with what happened in the instant case. There the Appeals Court satisfied itself that there had been procedural errors

on the part of the National Labor Relations Board in its handling of the case before it and without going any further with the remaining issues it remanded the case to the Board for the purpose of "setting aside its findings and order * * *." Here as soon as the District Court received evidence satisfactorily establishing the absence of constitutional hearings before decision, it suspended further proceedings and remanded the matter to the appellant and the Bureau of Land Management for correction of the errors.

This seems to be the preferred method of handling situations of this kind as it allows the Administrative Agency to correct its own legal errors and avoids any possibility of encroachment by the judiciary on the administrative field.

It should be noted, however, that in the opinion of the Supreme Court there was no finality in this remand as the Appeals Court retained jurisdiction to vacate the order of remand in the event of failure on the part of the Administrative Agency to carry out instructions, an event which would allow the Appeals Court to "proceed with its consideration of the petition to review."

It seems obvious that if the reviewing court retained the power to vacate the order of remand, it also retained jurisdiction and the order of remand was not final. In the present case, there was no attempt by the reviewing court to make any final disposition of the issues. It merely found that appellees had been denied their right to a constitutional hearing in the preservation of their property rights and remanded the cause to the appellant as Land Office manager for correction of that omission. Any other objection to the previous procedure might well be corrected in the course of the new hearings which had been prescribed in the Order of Remand.

The *Ford Motor* case is a leading one on this point and is cited by the Supreme Court in its decisions in:

Securities Comm. v. Chenery Corp., 332 U.S. 194, 200 (1946)

United States v. U.S. Smelting Co., 339 U.S. 186, 198 (1949)

Burlington Truck Lines v. U.S., 371 U.S. 156, 172 (1962)

In considering the question of finality, *2 Am. Jur. 2d.* under the subject "Administrative Law" had this to say at page 671:

> "A remittitur for further action following annulment of an agency determination does not necessarily deprive the order of finality. If all that is left for the agency to do is ministerial, the order is final. If the agency has the power and duty to exercise residual discretion to take proof, or to make an independent record, its function remains quasi-judicial, and the order is not final."

The Order of Remand in this case cannot be complied with without the making of a new and independent record and under the foregoing statement of the law, the Order of Remand does not have the finality necessary to support this appeal.

The above summarization was followed in *No. American Holding Corp. v. Murdock,* 6 N.Y.2d 902, 160 N.E.2d 926, where the New York Court of Appeals ruled (1959):

> "The Appellate Division, 6 A.D.2d 596, 180 N.Y.S. 2d 436, dismissed the appeal (from an order remitting a matter to the Board of Standards for further consideration) and held that in view of the fact that rehearing ordered involved the making of new and independent record, board would be required to exercise its judgment and discretion with respect to matters duly

> presented to it or re-presented to it, and consequently the order was intermediate and not final, and an appeal therefrom did not lie. * * * *."

In *Philadelphia Co. v. Securities & Exchange Comm.,* 84 App. D.C. 73, 175 F.2d 808, the Court held that if an agency takes adjudicatory action without holding an adequate hearing, the merits of the action taken are not before the Court and the Court must remand the case with directions to the Commission to hold an adequate hearing.

These authorities clearly establish that the Order of Remand in this case was not a final disposition of the issues in the case on their merits and therefore is not an appealable order.

Without waiving the foregoing contention, appellees reply to other grounds advanced by appellant.

B. The present action is against the appellant as manager of the United States Land Office at Sacramento, California. The Secretary of the Interior is not a party and never was.

A large part of the brief of appellant is affected by a persistent misconception of the nature of this action. The Secretary of the Interior is constantly being injected into the situation when he is not a party to the action and never was. The true nature of this action was pointed out very clearly by the United States Supreme Court in *Dugan v. Rank,* 372 U.S. 609, 621, (considered in this Court in *Rank v. Dugan,* 293 F.2d 340) where in referring to the impounding of the San Joaquin River waters behind Friant Dam, the Supreme Court said:

> "Nor do we believe that the action of the Reclamation Bureau officials falls within either of the recognized exceptions to the above general rule as reaffirmed only last Term. *Malone v. Bowdoin,* 369 U.S. 643. See *Larson v. Domestic & Foreign Corp.* supra (337 U.S.

682); *Santa Fe Pac. R. Co. v. Fall,* 259 U.S. 197, 199 (1922); *Scranton v. Wheeler,* 179 U.S. 141, 152-153, (1900). Those exceptions are (1) action by officers beyond their statutory powers and (2) *even though within the scope of their authority, the powers themselves or the manner in which they are exercised are constitutionally void. Malone v. Bowdoin,* supra, at 647. In either of such cases the officer's action 'can be made the basis of a suit for specific relief against the officer as an individual * * *.' Ibid." * * * *

And the Court added:

"the action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so 'illegal' as to permit a suit for a specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if *within those powers, only if the powers, or their exercise in the particular case, are constitutionally void.* Id. at 701-702." (Emphasis supplied)

In this particular case, it is alleged in the complaint (R-5-para. 9) that the exercise of appellant's power was constitutionally void in that appellees were deprived of their property rights by appellant's rejection of their applications without any hearing in a constitutional sense and without due process of law. This action therefore clearly comes within the purview of the Supreme Court's requirements in *Dugan v. Rank,* supra, and previous cases.

C. The discretion at issue here is that exercised by the appellant and the exercise of that discretion in this case is reviewable, discriminatory, arbitrary and capricious.

The Secretary of the Interior did not classify the lands in this case and is not a party to this action. The discretion at issue here is that exercised by the appellant and the

exercise of that discretion in this case is reviewable, discriminatory, arbitrary and capricious.

Two sentences in the appellant's brief may be said to epitomize this appellant's contentions with respect to official discretion in this action. They are:

p. 33 "In this case, the Secretary has the same absolute discretion as to how he will classify lands."

p. 34 "Only if the Secretary in the exercise of his discretion favorably classifies land, do rights accrue."

Appellant has reached these premises by confusing fact finding with managerial judgment. The contentions amount to a claim that if appellant declared unsuitable for agricultural development lands which were patently and demonstrably good farming land, his finding could not be questioned. Analysis of the cases cited by appellant shows that almost without exception, the decisions do not relate to the character of the land but to whether good management required its use for this purpose or that one. There was no necessity to determine the innate possibilities of the land itself. The case of *Ferry v. Udall,* 336 F.2d 706, is a good example of this difference. The decision left to the Secretary was whether the land should be sold or not. That was a matter of judgment and required no determination of any facts. The questions which the manager of the Sacramento Land Office had to decide was whether the lands sought by appellees met the statutory requirements for Desert Land entries. That was a question of fact which he answered one way in one instance and the opposite way in another instance with virtually the same set of facts. As this is a good example of how individual rights can be manhandled where official discretion is not supposed to be challenged, appellees cite their own case, evidence as to which is not of record for the reason that as soon as the lack of due process in the administrative procedure was

established, the District Court remanded the cause to the erring official for correction of the error. However, the complaint (R-5, para. 8) alleges the discrimination and the Transcript of Record (R-169) substantiates the facts given below.

So that there may be no misunderstanding as to the nature of the discrimination alleged by appellees, the following recital is inserted:

Appellees allege in Paragraph *VIII* of the first cause of action of their complaint (R-5) and repeated in the second cause of action (R-8) that lands covered in their rejected Desert Land applications and lands in Desert Land applications *allowed* by appellant were "nearby lands in the same identical soil belt as officially determined, classified and mapped by soil experts of the United States Department of Agriculture and the Agricultural Experiment Station of the University of California" and that the soils of the rejected and the allowed applications were substantially identical in their agricultural characteristics and possibilities.

Notwithstanding this fact, we have the following sequence of events all occurring in Township 32 South, Range 26 East, M.D.B.&M., in Kern County, California:

June 15, 1951.....	Luppen Desert Land Application allowed—Section 24 (R-169)
November 26, 1951	Noren Desert Land Application filed—Section 22 (R-3)
January 3, 1952.....	Perry Desert Land Application filed—Section 20 (R-4)
January 9, 1953.....	Noren and Perry Desert Land Applications rejected. (R-168) Soil unsuitable for agricultural development
May 21, 1953.....	Ivanhoe Desert Land Application allowed—Section 24 (R-169)

Summarizing, on June 15, 1951, the soil in question was suitable for agricultural development—In November, 1951, January, 1952 and on January 9, 1953, it was not and on May 21, 1953 it again became suitable for agricultural development. Truly a remarkable soil!

Where an administrative agency acts arbitrarily, capriciously, or fraudulently, such action constitutes an abuse of discretion, and, since it is unauthorized, an excess of jurisdiction subject to correction by the courts. Administrative determinations that violate constitutional rights by arbitrarily taking property or contravening procedural due process, although no element of fraud or bad faith is present, constitute abuses of discretion. Even determinations subject to only limited review will be rejected for fraud, bad faith, or such arbitrary and unreasonable action in wilful disregard of the law as amounts to constructive fraud. (2 Cal. Jur. 2d 377)

The argument of appellant here gives the impression that administrative discretion in cases of this kind is beyond review by the Courts. This Court in *Adams v. Witmer,* 271 F.2d 29, 33, thoroughly dispelled such an impression in the following language:

> "Of course the officers of the Bureau of Land Management such as the appellee, Witmer, and those authorized within the Department to review his action, are authorized and required to exercise discretion in passing upon applications for patents to mining claims or upon contests with respect thereto. But this does not preclude judicial review within the meaning of the exception here involved. See Homovich v. Chapman, 89 U.S. App. D.C. 150, 191 F2d 761, 764. The exercise of discretion by the agency does not in itself negative the right to judicial review. In view of what the Supreme Court has said about judicial review in Harmon v.

Brucker, supra, and in the cases there cited, we cannot assume that the discretion granted the officials of the Bureau of Land Management to make decisions in these cases is an unreviewable one."

In the foregoing opinion, this Court cites the decision of the United States Supreme Court in *Ballinger v. United States ex rel Frost,* 216 U.S. 240, 248, 30 S. Ct. 338, 340, in which the Court affirmed the action of the lower court in reviewing and disapproving a decision of the Secretary of the Interior.

Applying appellant's argument to the present case, official discretion which reaches one decision on one set of facts and an exactly opposite decision on a second set of virtually identical facts cannot be questioned in the courts.

It should be pointed out that a careful reading of 43 U.S.C.A. 315f clearly indicates that the discretion there given the Secretary is to decide when to classify and when not to. There is no discretion on the classification itself. There was no compulsion to classify in the original statute but in the amendment in 1936, there was added the mandatory requirement to classify when an application under any public land law was filed. Here, again the *discretionary* authorization was absent.

D. Appellees acquired inchoate property rights by the filing of their Desert Land applications, property rights which were entitled to but were denied the protection of the due process provisions of the United States Constitution by appellant.

The filing of Desert Land applications by appellees under the provisions of 43 U.S.C.A. 321, et seq., and their acceptance by the appellant under the provisions of 43 U.S.C.A. 315f (Sec. 7 of the Taylor Grazing Act) created inchoate property rights in each of the appellees, rights which were

entitled to but were denied the protection of the due process provisions of the United States Constitution by the appellant.

1. Before proceeding with the specific argument under this heading, some observations should be made with respect to some of the assertions made in support of appellant's position which have a bearing on this phase of the controversy.

Comment has already been made concerning the effort to endow appellant with all of the discretionary powers of the Secretary of the Interior and to apply a plethora of generalities to this specific case. There has also been considerable labor devoted to the proposition that official discretion is present in all of the actions of the Secretary of the Interior. However, the statutory fabric does not have that much stretch in it. It is certainly true, as this Court held in *Ferry v. Udall,* 336 F.2d 706 (1964), that the Secretary is empowered under 43 U.S.C.A. 315, to use in some instances his uncontrolled discretion in making a policy decision. The latter would be a matter of judgment. The same can be said of the discretion given the Secretary in deciding *sponte sua* to classify lands. It was a policy matter entrusted to him and the Congressional colloquy quoted by the appellant on pages 18-21 of his brief shows it. However, in this connection, this excerpt from 43 U.S.C.A. 315, would appear to be controlling:

> "Nothing in this chapter shall be construed in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law validly affecting the public lands, * * * except as otherwise *expressly* provided in this chapter * * *." (Emphasis supplied)

It is apparent from this language that Congress was not mincing any words about preserving the rights customarily

associated with applications under the existing public land laws, one of which, of course was the Desert Land Act.

One might think from appellant's assertions that it was his contention that the Secretary's discretion was sufficiently all-pervasive to color the meaning of this excerpt. There has been some intimation that classification of lands was entirely subject to the Secretary's discretion but this has been negatived by the language of the statute. Quoting from 43 U.S.C.A. 315f:

> "Provided, that upon the application of any applicant qualified to make entry, selection, or location, under the public-land laws, filed in the land office of the proper district, the Secretary of the Interior *shall* cause any tract to be classified * * * *." (Emphasis supplied)

The mandatory "shall" relieves the Secretary of his usual discretion on whether or not to classify and attention should be called to the rather obvious proposition that when a classification occurs, it must be entirely on a *factual* basis, unmodified by Secretarial discretion.

Combining the Congressional intent evidenced in the two statutory excerpts just quoted, and considering it in the light of the construction which appellant contends applies to the Taylor Grazing Act, it is apparent that sufficient effect has not been given administratively to Congressional intent. It cannot be doubted that the administrators of the Taylor Grazing Act have so construed it as to "diminish, restrict" and "impair" the rights heretofore initiated under the Desert Land Act contrary to specific Congressional intent.

Appellees regard the discretion of the Secretary as of questionable relevancy in this case but have discussed it with the idea that some of it might have rubbed off on the

appellant. However, this action is against the appellant and the only relevant discretion is that which he exercised.

2. The authorities are agreed that what the appellees acquired by filing their Desert Land applications was a property right.

The procedure followed by appellees in the filing of their applications established inchoate property rights in each of them. They filled out form Desert Land entry blanks provided by the Sacramento Land Office in the manner prescribed by that Office. The completed and signed forms were tendered to the Land Office along with the 25¢ per acre required by the statute and both were accepted by the Land Office. It is rather obvious that they had each acquired a right to the lands described in their applications, subject only to defeasance in the event of an unfavorable classification. The Land Office had to make a classification and by such classification determine whether the land qualified as desert land under the definition of 43 U.S.C.A. 322, i.e. that it was land which would "not without irrigation, produce some agricultural crop" and if it did qualify as desert land it was suitable for the production of agricultural crops. Such a classification would have to be based on the actual character of the land and not on official discretion. Furthermore, it would have to be an honest classification.

With this resumé of the factual situation, attention is turned to the nature of a property right.

In *U.S. v. Waddell,* 112 U.S. 76, 80, 28 L.Ed. 673, 5 S. Ct. 35, it was held:

> "By the original entry, he (entrant) acquires the inchoate right but well-defined right to the land * * *."

In *42 Am. Jur.* pp. 191-192, it is said:

> "It (the term 'property') extends to every species of right and interest capable of being enjoyed as such

> upon which it is practicable to place a money value. As applied to lands, the term comprehends every species of title, inchoate or complete."

In California recognized property rights are secured merely by filing applications to appropriate water. In *Yuba River Power Co. v. Nevada Irr. Dist.,* 207 C. 521, 523, one of the questions was whether a property right was acquired merely by filing such applications. The Supreme Court of California held that it was and defined "property" in the following language:

> "The word 'property' found in this section (738 C.C.P.) is a broad term and is specifically defined in Sections 654 and 655 of the Civil Code. The word is also defined as follows: The term 'property' is sufficiently comprehensive to include every species of estate, real and personal, and everything which one person can own and transfer to another. It extends to every species of right and interest capable of being enjoyed as such upon which it is practicable to place a money value. As applied to lands the term comprehends every species of title, inchoate or complete. It is supposed to embrace those rights which lie in contract, those which are executory as well as those which are executed. (22 R.C.L. p. 43, Sec. 10)."

This view was confirmed in *Madera Irr. Dist. v. All Persons,* 47 C.2d 681, 690, 306 P.2d 886 (1957), where it was said with respect to a water right:

> "Such right as was acquired was inchoate and incomplete and subject to defeasance upon the failure to perfect it in accordance with the law."

The point to be stressed here is that the possibility of defeasance did not make it any less a right.

In *73 C.J.S.* p. 691, it is stated:

> "One who has made a legal entry on public land acquires an equitable title or equitable rights. * * * The equitable title cannot be divested without his consent. * * *."

Finally, as late as December 31, 1961, the Bureau of Land Management in its Rules and Regulations relating to Desert Land entries (43 C.F.R. 232.13) provided as follows:

> "((c) * * * no rights to the land are initiated by the filing of an application unless this sum (25¢ per acre) is paid or tendered)."

The 25¢ per acre is required by the statute (43 U.S.C.A. 321) and was paid by appellees when their applications were filed and the complaint (R-4) so alleges. The somewhat amusing fact is that while the present controversy was pending in the District Court, the Regulation just referred to was excised from the Revised Regulations. There may be some significance in the timing of this elimination but the fact is recorded to account for the absence of this particular provision from the current revision of the Department's Regulations. The Bureau of Land Management obviously recognized the initiation of rights by appellees by the filing of their applications and the contentions to the contrary by appellant now seem to be a little far-fetched. Certainly after fulfilling the statutory requirements, appellees acquired a status embodying substantial property rights.

Appellees must have secured some status by reason of their filings as accepted by appellant and it could not be other than by the acquisition of property rights. Congress by its language called it a preference *right* and it was, of course, subject to defeasance through an unfavorable classi-

fication. It was, however, a right to property, inchoate as it was. It is argued that no right was obtained and appellant attempts to subject it to the language in the last sentence of 43 U.S.C.A. 315b in which Congress provided that a *grazing permit* "shall not create any right, title, interest, or estate in or to the lands." No such prohibition was attached to the preference *right* and it is a fair inference that the omission was the result of deliberate intent on the part of Congress. This confirms the original interpretation of the Bureau of Land Management that a right was initiated by the filing of a Desert Land application and the payment of the 25¢ per acre as required by the statute.

3. With these property rights at stake, appellees are entitled to a full constitutional hearing before the rights can be taken from them. Whatever may have been the rule prior to the decision of the United States Supreme Court in *Wong Yang Sung v. McGrath,* 339 U.S. 33, 49, 70 S.Ct. 445, 454, 94 L.Ed. 616, and notwithstanding the absence of a statutory provision, it is now fully agreed that a full orthodox constitutional hearing is required. This Court in *Adams v. Witmer,* 271 F.2d 29, 33, stated the proposition as follows:

> "* * * As the appellants' right to his mining claim was a property right, it follows that the requirements of due process necessitate that he have a hearing before he can be deprived of that property right. This constitutional requirement is no less mandatory than would be a mere statutory requirement for hearing. As stated in Wong Yang Sung v. McGrath, 339 U.S. 33, 49, 70 S.Ct. 445, 454, 94 L.Ed. 616, 'The constitutional requirement of procedural due process of law derives from the same sources as Congress' power to legislate and where applicable, permeates every valid enactment of that body.' "

In this phase of the controversy, appellant has contented himself with a bare statement that no rights were acquired by appellees but in this instance appellees believe that great deference should be paid to the rule of the Department of the Interior when the applications were filed and thereafter at least until January 1, 1962, to the effect that upon payment of the statutory 25¢ per acre, rights were initiated and the only rights which could have been intended in such a case were property rights.

Appellant claims that the procedures regulating the handling of public lands under the Taylor Grazing Act have been in effect for 29 years and that they are geared to Congressional intent. Such an intent is drawn, as usual, from Congressional language in the statute and at times from Congressional hearings. However, it is submitted that procedures in many administrative agencies have been changed by the decision of the United States Supreme Court in *Wong Yang Sung v. McGrath,* supra, (1949) which read into many statutes a hearing requirement never before recognized. The basis for this radical change was as stated by the Supreme Court:

> "But the difficulty with any argument premised on the proposition that the deportation statute does not require a hearing is that, without such hearing, there would be no constitutional authority for deportation. The constitutional requirement of procedural due process of law derives from the same source as Congress' power to legislate and, where applicable, permeates every valid enactment of that body. * * * *
>
> "When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality. * * * *
>
> "It might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceedings the like of which

> has been condemned by Congress as unfair even where less vital matters of property rights are at stake."

In *Morgan v. U.S.,* 304 U.S. 1, 18, 58 S.Ct. 773, 776, the ingredients of a fair hearing were given in some detail:

> "The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them."

A hearing requirement has been thus read into the Immigration Statute and, since the *Wong Yang Sung* case, into several other statutes, including those administered by the Department of the Interior. In *U.S. v. O'Leary,* 63 I.D. 341, 344 and 345, that Department itself ruled that in its administration of the public lands hearings under the Administrative Procedure Act were necessary in cases involving property rights despite absence of statutory provisions requiring them, using the following reasoning:

> "Inasmuch as a mining claim is a property claim which may not be invalidated without due process of law, hearings on the validity of such claims seem clearly to be within the scope of the court decisions referred to above holding that administrative proceedings in which a hearing is necessary in order to satisfy the requirements of due process must comply with the Administrative Procedure Act, even though there is no statute requiring that the matter be determined on the record after opportunity for agency hearing."

This Court commented on this Department ruling in *Adams v. Witmer,* 271 F.2d, supra, at page 33.

In the ruling, the Department included the following citation from *Cameron v. United States,* 252 U.S. 450, 460, 461, which contains some pronouncements applicable to this case:

> "Of course, the land department has no power to strike down any claim arbitrarily, but so long as the legal title remains in the Government it does have the power, after proper notice and upon adequate hearing, to determine whether the claim is valid and, if it be found invalid to declare it null and void. This is well illustrated in *Orchard v. Alexander,* 157 U.S. 372, 383, where * * * this court said: 'The party who makes proofs, which are accepted by the local land officers, and pays his money for the land, has acquired an interest of which he cannot be arbitrarily dispossessed. His interest is subject to state taxation * * * The Government holds the legal title in trust for him, and he may not be dispossessed of his equitable rights without due process of law. Due process in such cases implies notice and a hearing. But this does not require that the hearing must be in the courts, or forbid an inquiry and determination in the Land Department.' "

In the instant case, appellees filed Desert Land applications with the Sacramento Land Office made out on forms supplied by that office and completed in a manner satisfactory to the Land Office and accepted by it. They paid the money specified in the statute and despite this compliance with the foregoing Supreme Court ruling, appellant contends they acquired not an iota of a right.

E. The present action is not subject to the plea of res judicata.

Appellant attaches to his brief a copy of the complaint in Case No. 2139-ND filed by appellees in the District Court and a copy of the Court's Memorandum and Order in that case dated March 8, 1963, and argues that the language of this complaint proves that the issues in the present case had been decided in Case No. 2139. This is completely misleading and if the appellant had wanted to be fair with the Court and the appellees, he would also have attached

a copy of his successful motion to confine that case to the Administrative Record and at least refer to the reported decision in the No. 2139 case of *Noren v. Beck,* 199 F.S. 708, in which the Court in its final judgment clearly shows that its consideration did not go beyond the Administrative Record.

In his attempt to establish his point of res judicata, appellant, among other authorities, cites and relies on *Stark v. Starr,* 94 U.S. 477, 485, 24 L.Ed. 276, 278. That case provides not only the general rule but also an exception to it. Appellant excerpted the statement of the general rule as follows:

> "It is undoubtedly a settled principle that a party seeking to enforce a claim, legal or equitable, must present to the Court, either by the pleadings or proofs, or both, all the grounds upon which he expects a judgment in his favor."

However, the Court went on:

> "But this principle does not require distinct causes of action—that is to say, distinct matters,—each of which would authorize by itself independent relief, to be presented in a single suit, though they exist at the same time and might be considered together. * * * There was, therefore, no rule of law which compelled the presentation of the two causes of relief in the same suit. They required different allegations, in the bill, and different evidence on the hearing."

and proceeding further, the Court said on p. 486:

> "Having required the complainants to proceed in that suit only upon one cause or ground for relief, the court left the other cause open for any future suit which they might choose to bring."

This decision is particularly appropriate in the present instance as in Case No. 2139 in the District Court the

appellant forced the appellees to proceed only on the Administrative Record and successfully resisted amendments to bring in the issues raised in the present case. If the complaint in No. 2139 is appraised divested of the allegations which became irrelevant under the Order limiting consideration of it to the Administrative Record, the difference between it and the complaint in No. 2347 becomes extremely evident. In the latter case, much more would be decided than could have been adjudicated in 2139; 2347 embraces more subject matter than 2139. Consistent with the successful motion of appellants, the issue of discrimination could not be litigated in 2139; the question of denial of due process raised in 2347 could not be considered in 2139; additional facts not relevant in 2139 can be introduced in 2347; different rights are asserted in 2347 which could not be claimed in 2139. The bases of the action in 2347 will require different evidence on the hearing.

In the comparatively recent case of *Lawlor v. Nat. Screen Service Corp.* (1955), 349 U.S. 322, 326, 327, 75 S.Ct. 865, 99 L.Ed. 1122, the United States Supreme Court had occasion to deal with a plea of res judicata. It said:

> "Thus, under the doctrine of res judicata, a judgment on the merits in a prior suit involving the same parties or their privies bars a second suit *based on the same cause of action.*"

and went on:

> "That both suits involved 'essentially the same course of wrongful conduct' is not decisive." (Emphasis Supplied)

In the instant case, the causes of action were entirely different from that disposed of in No. 2139 and had been excluded from consideration in that case. The issues in the instant case are having their first day in Court.

Thus, where there is a distinctly different cause of action involved, the doctrine of res judicata does not apply, particularly when appellant, with the approval of the Court, prevented the earlier litigation of the different cause of action.

F. Appellees sustained substantial injury from the unconstitutional, discriminatory, arbitrary and capricious rejections of their applications.

Appellant naively suggests that appellees have suffered no damage from the rejections of their applications because *thereafter* they were allowed to file written statements, affidavits and a few photographs. While appellees availed themselves of this privilege, the deed was already on the record and the decision would stand or fall on whatever facts were on record before it was rendered. Furthermore, throughout the administrative process appellees were faced with the same combined prosecutor-judge arrangement which has been widely condemned for its lack of fairness and impartiality.

Appellees contend that with a constitutional, fair and impartial treatment of their applications without discrimination, those applications would have been allowed and appellees would now be in possession of lands with genuine agricultural possibilities of real merit as has been shown by subsequent developments in the adjoining areas, developments photographically in evidence as Exhibits 5 and 6 before the District Court and on file in this Court as a part of the Record on Appeal.

Appellant argues that appellees were not harmed by their treatment inasmuch as they were allowed to file all the evidence they desired with the Land Office at Sacramento, California. The best answer to this argument and a complete

one, it seems, is supplied by this Court in its decision in *Adams v. Witmer,* 271 F.2d 29, 36, where it was pointed out:

> "As a result there is no chance for appellant to have a decision based on the possibly greater credibility of its witnesses as against those for the Government. The opportunity to have that kind of hearing is a valuable right."

No such hearing, or even anything resembling it, was ever accorded appellees. So far as the evidence used by the Government in this instance is concerned, the first time appellees were ever aware of it was when they read the decision using it. They never had a reasonable opportunity to know this evidence or to meet it before it was used against them.

CONCLUSION

The appeal from the Order of Remand should be dismissed as that action of the District Court was not a final disposition of the issues in the case on their merits. Appellant speaks of reversing the judgment. There has been no judgment and none is before this Court.

Respectfully submitted,

Edson Abel
Attorney for Appellees

July, 1966

Certificate of Compliance with Rules

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Edson Abel
Attorney for Appellees